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11
12 UNITED STATES DISTRICT COURT
13 CENTRAL DISTRICT OF CALIFORNIA
14

15 ALFRED ZAKLIT AND JESSY
16 ZAKLIT, individually and on behalf of
17 all others similarly situated,

18 Plaintiffs,

19 vs.

20 NATIONSTAR MORTGAGE LLC and
21 DOES 1 through 10, inclusive, and each
22 of them,

23 Defendants.
24
25
26
27
28

Case No. 5:15-CV-02190-CAS-KK

**PLAINTIFF'S REPLY IN
SUPPORT OF MOTION FOR
CLASS CERTIFICATION
PURSUANT TO FED. R. CIV. P.
23(B)(3)**

Date: April 24, 2017

Time: 10:00 A.M.

Place: Courtroom 8D

Judge: Hon. Christina A. Snyder

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1 I. INTRODUCTION

2 After Plaintiffs Alfred and Jessey Zaklit filed their Motion for Class
 3 Certification on December 12, 2016, the Honorable Judge George H. King (ret.)
 4 granted class certification and denied a Motion to Dismiss for lack of Article III
 5 standing in a Penal Code § 632.7 class action that is virtually identical to the case at
 6 bar: *Raffin v. Medcredit, Inc.*, 2017 WL 131745 (C.D. Cal. Jan. 3, 2017) (granting
 7 class certification); *Raffin v. Medcredit, Inc.* 2016 WL 7743504 (C.D. Cal. Dec. 19,
 8 2016) (denying motion to dismiss). These decisions should hold as the gold standard
 9 for analyzing class certification under Rule 23 in the context of a Penal Code § 632.7
 10 class action against a debt collector whose common policy and practice is (just as is
 11 the case with Nationstar) to not issue a recording advisory to consumers until after
 12 gathering personal identifying information from them, i.e. not “at the outset” of the
 13 conversation. This Honorable Court should follow the blueprint that was laid out in
 14 the *Saulsberry* case, and followed through in the *Raffin* matter. Both of these
 15 decisions are consistent with This Honorable Court’s class certification ruling in *Ades*.

16 Defendant’s Opposition brief is an exercise in fighting the hypothetical of this
 17 incredibly straightforward case, and dodging the highly logical and common sense
 18 outcome in *Raffin v Medcredit*. What is clear from its scattershot Opposition is that
 19 Defendant knows it is in trouble because the weight of authority in this District holds
 20 that the issue presented by Plaintiffs is common, and certifiable. Defendant is
 21 throwing everything but the kitchen sink at Plaintiffs in the form of possible defenses
 22 hoping that something, *anything* will stick. But Defendant’s arguments can all be
 23 easily addressed by the common proof and common law that governs these important
 24 consumer privacy rights, as This Court, Judge Bernal, and Judge King carefully laid
 25 out in the aforementioned well-reasoned Orders.

26 Defendant cites almost exclusively to non-binding authority in support of its
 27 contrary (and incorrect) vision of what the IPA requires, and spends what seems like
 28 half of its brief arguing the merits of the law and damages issues rather than

1 demonstrating why certification of the class would be inappropriate. Defendant's
 2 subsequent Rule 23 arguments regarding individualized consent are all premised on
 3 this incorrect view of the law, for which there is no binding authority. Defendant also
 4 relies on the position that it had "implied consent" to record customers as a basis to
 5 challenge commonality and predominance. But this fabrication of the defense bar has
 6 been rejected by numerous courts, including This Honorable Court in the *Ades*
 7 decision, as well as in *Raffin*. Moreover, as Judge King observed in *Raffin*, whether
 8 there is implied consent would be a common merits issue that can be addressed after
 9 certification in a summary judgment motion.¹ The class definition can be easily
 10 tailored, as in *Raffin*, to avoid individualized issues entirely, to the extent they exist.

11 Nationstar (similarly to defendant in *Raffin*) makes an Article III standing
 12 argument, which fails for three reasons. First, a class certification opposition is not
 13 the procedurally correct method of requesting affirmative relief from a court. Second,
 14 IPA claims necessarily involve privacy rights, which are substantive rights that give
 15 rise to Article III standing. Finally, as the Ninth Circuit has held, class actions satisfy
 16 Article III where a single named plaintiff alleges sufficient facts to show standing.²

17 Defendant next spends a great deal of effort engaging in a battle of the experts,
 18 attempting to cast Mr. Borlin as inadequate. However, it bears mention that Mr.
 19

20 ¹ Nationstar's reliance on a notification in the fine print of the back of its billing
 21 statements is a red herring as well. The disclaimer it points to clearly relates to
 22 customer service calls that a consumer would place to Nationstar at the number
 23 provided. It says nothing about calls that Nationstar would make to a consumer from
 24 its debt collection department being recorded. The class definition expressly excludes
 25 inbound calls to Nationstar from consumers. It also does not relate to customer
 26 service calls, only debt collection calls (the only outbound calls that Defendant places
 27 and records). This evidence is completely irrelevant, and Defendant's heavy reliance
 28 on it borders on frivolous. Moreover, this too is a merits issue.

² Even if the Honorable Court were persuaded that there is no standing, the appropriate
 action would be to remand the case to state court, not deny class certification. *Benton*
v. Clarity Services, Inc., 2017 WL 345583 (N.D. Cal. Jan. 24, 2017).

1 Borlin's testimony was not instrumental to certification in *Raffin*, and is not
 2 instrumental here, because his testimony speaks only to the issue of "feasible
 3 methodology" as a fallback position to a class definition that will not be the ultimate
 4 class that is certified by This Honorable Court if it follows the *Raffin* reasoning.
 5 Furthermore, prevailing and binding Ninth Circuit authority holds that plaintiffs not
 6 only do not have to identify class members to meet their burden under Rule 23, but
 7 also do not even have to present a feasible methodology for doing so, as manageability
 8 issues are best reserved post-certification. See *Briseno v. ConAgra Foods, Inc.*, 844
 9 F.3d 1121 (9th Cir. 2017).³ Defendant's heightened focus on Mr. Borlin demonstrates
 10 that it is attempting to sidestep a straightforward Rule 23 analysis, rewrite Plaintiffs'
 11 class certification theory to overly complicate the matter, and jump the gun by
 12 prematurely focusing on post-certification damages and merits issues.⁴ Defendant's
 13 battle of the experts will have its day in court, but it is not this day.⁵

14 _____
 15 ³ Defendant's arguments regarding how challenging and time consuming it will be to
 16 physically download recordings is a red herring because recordings do not need to be
 17 reviewed at all in this case, since it was Defendant's standard policy and practice to
 18 violate § 632.7 by not issuing a recording advisory at the outset of any of its calls.
 19 Moreover, even if a review of the recordings were necessary, it is premature.
 20 Plaintiffs should be given the opportunity analyze the system via a site inspection.
 21 Defendant's position that it would take five minutes to download a single 30 second
 22 .wav file from Verint demonstrates only that its witnesses are unsophisticated in
 23 database management. Data can always be pulled in batches by running targeted
 24 queries. Mr. Hansen is an expert in database systems with 20 years of experience
 25 working with such systems. This is clearly a post-certification manageability issue.
 26 *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1127-28 (9th Cir. 2017).

27 ⁴ Mr. Borlin and Veritone both signed the Protective Order. Defendant's arguments
 28 that there was a breach of confidentiality are misplaced. Bacon Decl. Ex A.

⁵ Defendant did not disclose its expert prior to filing its Opposition to class
 certification. Plaintiffs did not have sufficient time prior to the filing of this Reply to
 depose and conduct discovery on Defendant's expert, despite the fact that Plaintiffs
 accommodated Defendant's requests to depose and conduct discovery on all three of
 their experts by numerously stipulating to extend Defendant's Opposition deadline.
 Defendants had four months to engage in discovery of Plaintiffs' experts. Plaintiffs

1 Finally, Defendant's statements about damages issues and its potential
 2 liability being grossly excessive strongly signifies that Defendant is acknowledging
 3 common and prevalent violations of the IPA based on its common scripts and policy
 4 of following them. Defendant intends on arguing merits issues and appealing to the
 5 emotional sensibilities of the tribunal in order to evade certification. But this is
 6 completely inappropriate, as the Ninth Circuit recently held in *Wright et. al.*
 7 *Renzenberger, Inc.*, Case No. 14-55944 (9th Cir. July 21, 2016). Nationstar, a
 8 mortgage servicing conglomerate which oversees roughly \$500 billion in loans, is
 9 turning for empathy where none is due.

10 What should be remembered throughout the Honorable Court's consideration
 11 of Plaintiffs' Motion is the basic premise of Plaintiffs' IPA claim, stems from
 12 Defendant's employment of a standard non-compliant policy and procedure, which
 13 has caused a mass invasion of privacy for the proposed classes:

14 Defendant records each and every outbound call with any consumer, yet,
 15 does not inform them that they are being recorded at the outset of the calls,
 16 and instead only informs them of such (sometimes) after gathering
 confidential personal and private information.

17 These sizable gaps in Defendant's standard policies and practices resulted in
 18 Defendant recording Plaintiffs (and nearly seventy thousand other Californians)
 19 without knowledge or consent, which is the operative legal test in dispute. *NEI*
 20 *Contracting & Eng'g, Inc. v. Hanson Aggregates Pac. Sw., Inc.*, 2016 WL 4886933,
 21 at *3 (S.D. Cal. Sept. 15, 2016). Defendant makes numerous arguments about
 22 individualized issues surrounding knowledge and consent, but in fact provides no
 23 evidence whatsoever of any of the individualized issues that it claims will
 24 predominate the topic. Conjecture cannot serve as a basis to deny class certification,
 25 especially when faced with a common, non-compliant policy.

26 _____
 27 had less than two weeks. This should be taken into account if the Court is inclined to
 28 give any credence to Defendant's expert's testimony.

Consent is simply not an individualized issue.⁶ Just as in *Raffin*, Nationstar's common written policy and practice, its standardized scripts, its Rule 30(b)(6) witness, and all of the recordings that were produced in its sample, demonstrate conclusively that its practice, in all cases, was not to tell anyone it called that it was recording them, unless or until after they gathered personal identifying information from the consumer.⁷ *Raffin*, *Saulsberry* and *Ades* tell us that this very set of facts presents a certifiable issue. To rule differently in this matter would be to go against the weight of recent authority. Nationstar has presented no convincing reason to take such an extreme departure from these decisions. The class should be certified.

II. LEGAL ARGUMENT

A. *Raffin v. Mediacredit* Is A Virtual Mirror Image Of The Case At Bar, And An Identical Result Should Be Reached

After Plaintiffs filed their Motion for Class Certification on December 12, 2016, two landmark decisions were issued by Hon Judge George H. King in the matter of *Sheena Raffin v Mediacredit, Inc., et. al.* Case No. 2:15-cv-04912-MWF-PJW.⁸ Like the case at bar, *Raffin* involves a Penal Code § 632.7 class action against a debt collector, which was calling consumers on their cell phones to collect on their accounts, and recording the conversations it held with consumers without their knowledge or consent. Like the case at bar, *Raffin* involves a scenario where standardized scripts, written policies and testimony of the Rule 30(b)(6) witness all corroborated a common policy and practice whereby the defendant does not issue a recording advisory at the outset of the conversation, but instead only does so after

⁶ Defendant's position regarding consumers who received the calls while outside California relies on principles rejected in *Ades v. Omni Hotels Management Corp.*, 2014 WL 4627271, *6-8 (C.D. Cal., Sept 8, 2014), as well as *Raffin*.

⁷ Defendant mischaracterizes Plaintiffs' testimony regarding their understanding of the case, and points out that Mr. Zaklit has filed a couple of class action cases in the past. The Court should view this argument with a skeptical eye because Defendant's line of argument clearly does not arise from any genuine concern for Class Members.

⁸ The case was transferred to Judge Fitzgerald after Judge King retired.

1 gathering personal identifying information from the consumer and verifying that they
 2 are the debtor with whom they are attempting to discuss the account. And like
 3 Plaintiffs in the case at bar, Ms. Raffin was one such consumer who was contacted in
 4 such a manner on her cell phone, and whose voice was recorded without her being
 5 advised at the outset of the call that she was being recorded.

6 The first decision, *Raffin v. Mediacredit, Inc.* 2016 WL 7743504 (C.D. Cal. Dec.
 7 19, 2016), denied defendant's motion to dismiss for lack of Article III standing. Like
 8 the case at bar, defendants contended that plaintiff lacked Article III standing, because
 9 she had asserted a bare procedural violation of a statute, and lacked actual injury. The
 10 court reviewed applicable law on the topic, including *Bates v. United Parcel Serv.,*
 11 *Inc.*, 511 F.3d 974, 985 (9th Cir. 2007), *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016),
 12 and *Matera v. Google Inc.*, 2016 WL 5339806 (N.D. Cal. Sept. 23, 2016), concluding
 13 that a "violation of someone's right to privacy is not just a 'bare procedural violation,'
 14 *Spokeo*, 136 S. Ct. at 1549; it is 'an affront to human dignity,' *Friddle v. Epstein*, 16
 15 Cal. App. 4th 1649, 1660-61 (1993)." *Raffin v. Mediacredit, Inc.* 2016 WL 7743504
 16 at *3 (C.D. Cal. Dec. 19, 2016). Nationstar has similarly engaged in identical conduct
 17 as Mediacredit, conduct which is likewise "an affront to human dignity." *Id.* It is
 18 through this lens that class certification, and the case as a whole should be analyzed.

19 The second decision, *Raffin v. Mediacredit, Inc.*, 2017 WL 131745 (C.D. Cal.
 20 Jan. 3, 2017) granted plaintiff's motion for class certification. The facts of the case,
 21 and the theory upon which class certification was based were virtually identical to the
 22 case at bar. Just like in this case, in *Raffin*, the essence of the claim was that the
 23 defendant violated § 632.7 by recording phone conversations without first obtaining
 24 consent. The class involved one single and predominating question of law that could
 25 be determined in one stroke: does the CIPA require that a California consumer be
 26 advised that he or she is being recorded at the outset of a debt collection call? *Id.* at
 27 *5. The court observed that there was sufficient evidence of a common policy and
 28 practice, because, just like Nationstar, Mediacredit relied on collections agents to

1 verbally issue a scripted advisory to customers when it called their phones. These
 2 scripts instructed agents not to “inform the other party to the call that the call was
 3 being recorded until at least identifying that party” i.e. by gathering personal
 4 identifying information. *Id.* Coming to this conclusion, the court reviewed standard
 5 scripts, written policies, and testimony of defendant’s Rule 30(b)(6) witness.⁹

6 The primary dispute at certification, as is the case here with Nationstar, was
 7 whether individualized issues of actual and implied consent predominate. Medicredit
 8 made the same arguments that Nationstar makes: it is impossible to determine whether
 9 someone with a California area code was present in California at the time they were
 10 recorded;¹⁰ that individualized issues of consent predominate, and that plaintiff’s
 11 methodology for identifying class members was not feasible. Ultimately, the court
 12 found these issues insignificant and contrary to both common sense and the evidence
 13 of the case, and ruled that predominance was satisfied, certifying the class action.

14 There are two key factual distinctions between the case at bar and *Raffin*, which
 15 make this case even more fit for class certification than *Raffin*.

16 First, the recording advisory in *Raffin* per the standardized scripts stated “all
 17 calls may be monitored and/or recorded” (*Id.* at *7 emphasis in original), while the
 18 recording advisory in the case at bar uses the phrase “This call may be recorded for
 19

20 ⁹ *Raffin* submitted declarations from Borlin, Hansen and Mullins that largely mirrored
 21 the declarations in the case at bar. Medicredit submitted a rebuttal expert declaration.
 22 Both parties objected. The court determined that it did not need to rely on the expert
 23 declarations to rule on whether Rule 23 had been satisfied. *Id.* at *3 n 3.

24 ¹⁰ Judge King followed This Honorable Court’s ruling in *Ades v. Omni Hotels Mgmt.*
 25 *Corp.*, 2014 WL 4627271, at *7 (C.D. Cal. Sept. 8, 2014) in holding: “We think it
 26 more likely than not that a person with a California area code will have been located
 27 in California at the time of the call. In any case, just because cell site location may be
 28 difficult to obtain does not mean that it cannot be obtained. *Raffin* has identified
 objective criteria that will allow class members to identify themselves. If Medicredit
 believes that a putative class member was outside California during a call, it can offer
 evidence to disqualify the member.” *Raffin v. Medicredit, Inc.*, 2017 WL 131745 at
 *3 (C.D. Cal. Jan. 3, 2017).

1 quality assurance purposes” (emphasis added). This is important because of the
2 holding in *Kight v. Cashcall*, 200 Cal. App. 4th 1377, 1399 (2011). There, the
3 California Court of Appeal reasoned that hearing an automated disclosure once
4 “would not necessarily inform a borrower that this call and all future calls” may be
5 monitored or recorded. *Kight v. Cashcall*, 200 Cal. App. 4th 1377, 1399 (2011).
6 Stated otherwise, merely because a person is told during one call that they are being
7 recorded does not mean they have reason to assume they are recorded in future calls.
8 The *Raffin* case gave rise to such an inference, because agents directly told consumers
9 that “all calls” would be recorded, but that presumption of implied consent to
10 subsequent calls is not present for Nationstar borrowers.

11 To address this issue, the *Raffin* Court tailored the class definition that was
12 ultimately certified, to avoid the issue of implied consent in subsequent calls entirely:

13 “Even if Raffin's understanding of the law is correct, Medicredit did not
14 necessarily violate § 632.7 because a class member may have consented
15 to being recorded prior to a call that took place within the proposed
16 Class Period. Indeed, Medicredit submits reports showing that, in some
17 circumstances, it has frequent contact with the debtors it calls. (See Dkt.
18 53, Exs. E-G.) And Medicredit's scripts direct collections agents to
19 warn that *all* calls may be monitored and/or recorded. (See Dkt. 46, Ex.
20 B.) Whether and when a recording advisory was provided on a call will
21 not necessarily determine whether consent was given if consent is either
22 expressly or impliedly provided through prior calls. We would have to
23 examine whether a class member had previously received a call and
24 under what circumstances. Such a task would generate individualized
25 inquiries that would predominate over common questions, making class
26 certification inappropriate.

27 However, assuming Raffin's understanding of the law is correct, this
28 problem can be cured by narrowing the class definition to include only
those claims relating to an individual's first recorded conversation with
a Medicredit representative. By doing so, Raffin's proposed question
will generate common answers because every such individual was
exposed to Medicredit's uniform policy of recording a conversation
without first informing the individual that the conversation was being
recorded. Accordingly, we narrow the class definition to claims relating

1 to an individual's first recorded call with a Mediacredit representative.”
 2 *Id.* at *7. These issues are not present in the case at bar, for the simple reason that the
 3 language spoken to borrowers by Nationstar would not put them on notice that future
 4 calls would be recorded, as the advisory in Raffin arguably may have done.¹¹

5 *Raffin* is distinguishable in one other critical respect. Ms. Raffin was given no
 6 recording advisory at all during her call with Mediacredit, because in the case of her
 7 particular call, the call was ended before the parties got to the point in the script where
 8 a mini-miranda would have been issued. Mediacredit argued that this presented a
 9 typicality issue, as well as a predominance issue, because Raffin’s call clearly violated
 10 the IPA since there was no recording advisory whatsoever, whereas Mediacredit
 11 contended that calls (like the Zaklit’s, where an advisory *was* given after gathering
 12 personal identifying information) would not violate the IPA. The court addressed this
 13 issuing a merits determination that both types of calls violate § 632.7, putting to rest
 14 any dispute as to there being relevant liability distinctions between each type of call.
 15 The court began the analysis by observing that both § 632 and § 632.7 contained the
 16 same “without consent language.” *Id.* at * 7. The court went on to analyze the
 17 meaning of § 632.7 by reviewing the Supreme Court’s interpretation of § 632:

18 “[T]his provision does not absolutely preclude a party to a telephone
 19 conversation from recording the conversation, but rather simply
 20 prohibits such a party from secretly or surreptitiously recording the
 21 conversation, that is, from recording the conversation without first
 22 informing all parties to the conversation that the conversation is being
 23 recorded. If, after being so advised, another party does not wish to
 24 participate in the conversation, he or she simply may decline to

24 ¹¹ Language is important, and this key difference in word choice matters. The First
 25 Circuit just decided the merits of a class action alleging overtime misclassification of
 26 a job position under Maine employment law based on the omission of an Oxford
 27 comma from the language of a statute. *O'Connor v. Oakhurst Dairy*, 2017 WL
 28 957195 (1st Cir. March 13, 2017). Surely the difference between “all calls” and “this
 call” is even more pertinent, as it could mean the difference between class-wide
 damages of \$336,530,000 vs. \$890,390,000. Kemp Decl., Ex. C, ¶¶ 52-53.

1 continue the communication. A business that adequately advises all
 2 parties to a telephone call, at the outset of the conversation, of its intent
 to record the call would not violate the provision.”

3 *Kearney v. Salomon Smith Barney, Inc.*, 39 Cal. 4th 95, 117-18 (2006) (emphasis
 4 added). Judge King interpreted § 632.7 in the only possible way that these two
 5 emphasized (and binding) phrases could be reasonably harmonized:¹²

6 “We take this passage to mean that § 632.7 prohibits recording of a
 7 conversation prior to informing the parties to the conversation that the
 8 conversation is being recorded. In other words, to obtain a party's
 9 consent to record, a recording advisory must be given before the party's
 communication is recorded....

10 The most reasonable way to harmonize the phrases “without first
 11 informing” and “at the outset” is to conclude that the “outset” is prior
 12 to any recording of the plaintiff's communication. See also *Friddle v.*
 13 *Epstein*, 16 Cal. App. 4th 1649, 1661 (1993) (discussing § 632 and
 14 noting that “[p]laintiff invaded defendants' privacy and violated the
 15 privacy act at the moment he began making his secret recording. No
 16 subsequent action or inaction is of consequence to this conclusion.”
 17 (emphasis added)). This interpretation is also consistent with the
 18 dictionary definition of “outset,” which means “beginning” or “start.”
 Merriam-Webster's Collegiate Dictionary 826 (10th ed. 1998).
 Therefore, at the start of a conversation, before any recording of another
 party's communication has taken place, that party must be informed that
 the conversation is being recorded...

19 Medcredit's recording policy did not comply with this requirement.
 20 Because every putative class member was subject to this policy on a
 21 uniform basis, determining consent to record can be accomplished
 22 without resort to individualized proof. On the record before us, Raffin
 has met her burden of showing that common questions will
 predominate at trial.”

23 *Raffin v. Medcredit, Inc.*, 2017 WL 131745 at *7-9 (C.D. Cal. Jan. 3, 2017).

24 This presents a critical distinction from the case at bar, because here, there is no
 25

26 ¹² Citing *Tompkins v. 23andMe, Inc.*, 840 F.3d 1016, 1023 (9th Cir. 2016) (“When the
 27 state's highest court has not squarely addressed an issue, we must predict how the
 28 highest state court would decide the issue....” (internal quotation marks omitted)).

1 typicality issue regarding Plaintiffs’ calls being different from any of the class
 2 members with respect to whether a recording advisory needs to be given at the
 3 “outset” of a conversation.¹³ If Defendant’s recordings of Plaintiffs’ phone calls
 4 violate the IPA, then the recordings of the rest of the proposed class members violate
 5 the IPA as well. Because of this distinction, the merits issue that *Raffin* decided need
 6 not be decided by the Court now.¹⁴ It can be reserved for summary judgment.¹⁵

7 **B. Plaintiffs Tailor Their Class Definitions To Those Certified in *Raffin***¹⁶

8 *Raffin* significantly clarified how Penal Code § 632.7 class actions should be
 9 analyzed under Rule 23, in relationship to a defendant whose common policy and
 10 practice is to not issue timely recording advisories at the outset of its conversations
 11 with debtors. As the Parties and the Honorable Court now have the benefit of Judge
 12 King’s well-reasoned Order in *Raffin*, Plaintiffs proffer two revised class definitions
 13 for the Honorable Court’s consideration.¹⁷

14 _____
 15 ¹³ There is zero evidence in the record of this case to suggest that even a single class
 16 member was told that they were being recorded at the outset of any recorded
 17 conversations for outbound calls, under the legal definition of “outset” advanced in
 18 *Raffin*. Defendant cannot get around this fact. All it can do is raise other forms of
 19 irrelevant individualized issues that have been rejected by This Court in *Ades* and also
 20 in both *Saulsberry* and *Raffin*, or separately argue that Judge King got it wrong on the
 21 substantive law (a merits issue).

22 ¹⁴ Courts are only to consider merits questions to the extent they overlap with Rule 23
 23 requirements. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011).
 24 No such overlap exists here.

25 ¹⁵ Of course, if the Honorable Court believes otherwise, Plaintiffs would respectfully
 26 request that the Court follow the merits ruling of *Raffin*, which is the correct legal
 27 holding as to the requirements under § 632.7 and the only way to harmonize the
 28 language of the statute with existing binding precedent governing the CIPA.

¹⁶ This tailoring fully addresses any and all arguments raised by Defendant pertaining
 to the class definition being a fail-safe class, or being arbitrary.

¹⁷ Narrowing a class definition at the certification stage is accepted as proper by
 courts, and routinely is required to meet evolving Rule 23 standards. *See Abdeljalil*
v. General Elec. Capital Corp., 306 F.R.D. 303, 306 (S.D. Cal. 2015); *Wolf v.*
Hewlett Packard Company, 2016 WL 7743692 at *8 ft. 4 (C.D. Cal. Sept. 1, 2016);

1 IPA 632.7 Class:

2 All individuals who, from October 23, 2014 to May 2016, while
 3 physically present in California and using a cellular device with
 4 a California area code, participated in an outbound¹⁸ telephone
 5 conversation with a representative of Defendant or their agents
 6 who were recording the conversation without first informing the
 7 individual that the conversation was being recorded.

8 IPA 632.7 First Call Subclass:

9 All individuals who, from October 23, 2014 to May 2016, while
 10 physically present in California and using a cellular device with
 11 a California area code, participated for the first time in an
 12 outbound telephone conversation with a representative of
 13 Defendant or their agents who were recording the conversation
 14 without first informing the individual that the conversation was
 15 being recorded.

16 Plaintiffs are already in possession of information necessary to identify class
 17 members, and has crafted a narrowly tailored class definition that is comprehensive
 18 of the individuals who were subjected to Defendant's allegedly unlawful IPA policies
 19 during the applicable class period. Plaintiffs have demonstrated a methodology for
 20 providing notice to the Class and ascertaining their whereabouts and identities. These
 21 identities are in the possession of Defendant, whose account notes reveal the names,
 22 social security numbers, addresses and phone numbers of the people it recorded.¹⁹
 23 Plaintiffs leave it to the sound discretion of the Honorable Court as to whether

24 *Raffin v. Mediacredit, Inc.*, 2017 WL 131745 at *7-9 (C.D. Cal. Jan. 3, 2017).

25 ¹⁸ "Outbound" is defined as calls placed outbound from Defendant to Class Members.

26 ¹⁹ Defendant incorrectly conflates manageability issues relating to providing notice
 27 with ascertainability issues. Plaintiffs' counsel has used these methods in numerous
 28 consumer class actions that have been administered without any trouble, including
 these cases. *See Aboudi v. T-Mobile USA, Inc. Case No. 12-CV-2169-BTM* (S.D.
 Cal. 2015); *Abdeljalil v. General Elec. Capital Corp.*, 306 F.R.D. 303 (S.D. Cal. 2015)
 (granting certification, finding class ascertainable despite similar over-inclusiveness
 arguments raised by Defendant, and employing similar reverse lookup methods for
 sending notice to the class); *Stemple v. QC Holdings, Inc.*, 2014 WL 4409817 (S.D. Cal.
 Sept. 5, 2014) (same).

1 certification is appropriate for the proposed Class, Subclass, or both.²⁰

2 **C. Maghen v. Quicken Loans Is An Unpublished And Non-Binding Merits**
 3 **Decision That is Distinguishable, Wrong On The Law, And Irrelevant To**
 4 **the Rule 23 Analysis**

5 To counter *Raffin*, Defendant relies heavily on the recent case of *Maghen v.*
 6 *Quicken Loans Inc.*, 2017 WL 711088 (9th Cir. Feb. 23, 2017)²¹ for the position that
 7 Judge King was wrong in his interpretation of the phrase “at the outset,” and uses this
 8 as a basis to oppose class certification. Defendant’s heavily reliance on this
 9 unpublished decision is misplaced for several reasons.

10 First and foremost, *Maghen* is distinguishable on its facts. *Maghen* involves
 11 solicitation calls, not debt collection calls. Calls of the nature Defendant was making
 12 to class members, by its own standardized scripts, involves the discussion of sensitive
 13 personal information at the very beginning of the conversation, including name, date
 14 of birth, address, and social security number. This exchange occurs before a class
 15 member is told that they were being recorded, in each and every call that falls under
 16 the purview of the class definitions above. *Maghen* did not analyze what occurred
 17 during the conversation, nor analyze what sort of conduct would constitute the
 18 “outset” of a conversation. The Order also does not address the nuances of *Kearney*,
 19 and its holding that the IPA prohibits the recording of any conversation “without first

20 ²⁰ Even if the Honorable Court is persuaded by Defendant’s arguments regarding
 21 individualized issues of consent, all Defendant succeeds in doing is narrowing the
 22 damages to one violation per class member (i.e. their first recorded call). The
 23 appropriate thing to do under such circumstances would be to tailor the class
 24 definition, not deny certification outright. “[Defendant] has a point here, but it can be
 25 addressed by simply modifying the class definition as opposed to denying class
 26 certification outright.” *Waller v. Hewlett-Packard Co.*, 295 F.R.D. 472, 485-90
 27 (S.D. Cal. 2013). *See also Wolf v. Hewlett Packard Company*, 2016 WL 7743692 (C.D. Cal. Sept. 1, 2016) (Hon. Judge O’Connell presiding, tailoring the class
 28 definition from nationwide claims to California state claims, and tailoring all purchases of class products to brick and mortar purchases), and *Raffin v. Medicredit, Inc.*, 2017 WL 131745 at *7-9 (C.D. Cal. Jan. 3, 2017).

²¹ Both *Raffin* and *Maghen* are Plaintiffs’ counsel’s cases.

1 informing all parties to the conversation that the conversation is being recorded.” In
 2 that respect, Judge King’s Order in *Raffin* provides a much more robust and compelling
 3 review of the law surrounding these issues, one which is much more likely to be the
 4 result that the California Supreme Court would reach on the issue.

5 Perhaps most different of all from this case is that the plaintiff in *Maghen* agreed
 6 to a set of terms and conditions, which expressly disclosed that all calls were recorded.
 7 Specifically, those terms stated: “By submitting your contact request for a loan
 8 product, you are consenting to be contacted by one or more lenders which may include
 9 any one of our over 200 Network lenders ... who may [contact you] either by telephone
 10 (on a recorded line), email or mail.” *Maghen v. Quicken Loans Inc.*, 94 F. Supp. 3d
 11 1141, 1142 (C.D. Cal. 2015). It was undisputed that *Maghen* agreed to these terms.
 12 This was the primary focus of the Order, with the discussion of the term “at the outset”
 13 being largely superfluous dicta. There are no terms and conditions that the Zaklits,
 14 or any members of the proposed Class and Subclass were ever provided with or agreed
 15 to, which disclosed that Nationstar would contact Class Members on a recorded line.
 16 This fact is nowhere in the record. And yet it is the lynchpin of the *Maghen* decision.

17 Secondly, *Maghen* is an unpublished decision, and therefore is not binding on
 18 this Court. Ninth Circuit Rule 36-3(a) (“Unpublished dispositions and orders of this
 19 Court are not precedent”). Indeed, Medcredit petitioned for it to be published, but its
 20 request was denied. See *Maghen v. Quicken Loans Inc.*, Case No. 15-55684 (9th Cir.)
 21 Dkt. No. 50 (March 16, 2017). Because *Maghen* is non-binding, it would not be in
 22 error for the District Court to ignore the decision entirely in coming to a class
 23 certification decision. Moreover, comparing *Maghen* to *Raffin* as equals from a
 24 precedential/persuasive authority standpoint, it is abundantly clear that *Raffin* is more
 25 factually analogous, and proffers a much more robust and compelling discussion of
 26 the requirements under § 632.7, that a debt collector must advise a consumer “at the
 27 outset” of a call that they are being recorded, before doing so.

28 Thirdly, *Maghen* is a merits decision, which for reasons discussed below is not

1 appropriate for consideration on class certification, unless it is necessary to determine
 2 issues pertinent to Rule 23. Doing so is not necessary in the case at bar, due to the
 3 distinction between this case and the *Raffin* matter, where determining the legal
 4 application of “at the outset” was only required to avoid typicality issues. *Maghen*
 5 can, and frankly should be ignored entirely by This Honorable Court.

6 **D. Plaintiffs Have Met All Standards Under Rule 23**

7 **1. Plaintiffs Present Common Issues Of Fact And Law**

8 **a. The District Court Cannot Make Merits Decisions In** 9 **Determining Class Certification.**

10 Defendant’s entire challenge to commonality and predominance is guilty of the
 11 classical mistake of fighting the hypothetical. As the Ninth Circuit recently observed
 12 in a decision overturning a district court’s denial of class certification, “[w]hether
 13 Renzenberger’s policies complied with the law was a common question, whatever its
 14 merits.” *Wright et. al. Renzenberger, Inc.* Case No. 14-55944 at * 3 (9th Cir. July 21,
 15 2016) (citing *Stockwell v. City & County of San Francisco*, 749 F.3d 1107, 1113- 14
 16 (9th Cir. 2014)). Defendant clearly disagrees with Plaintiffs’ view of the law, and
 17 cites heavily to *Maghen* as authority. There is a proper place for Defendant’s
 18 arguments: a summary judgment motion. Defendant’s heavy reliance on *Maghen*
 19 belies its opposition to certification. “Such an argument that challenges the merits of
 20 Plaintiffs’ allegation...has no bearing on the Rule 23 predominance inquiry.”
 21 *Forcellati v. Hyland's, Inc.*, 2014 WL 1410264 (C.D. Cal. April 9, 2014).

22 **b. Individualized Issues do not Predominate**

23 **i. There Undoubtedly Is No Knowledge Or Consent Before The** 24 **First Recorded Call, Thus The IPA 632.7 First Call Subclass** 25 **Should Be Certified**

26 As Defendant acknowledges in its brief, the source of Defendant’s argument
 27 that there may be individualized issues of knowledge or consent derives wholly from
 28 the concept that a borrower would somehow be “informed the call may be recorded
 from some other sources [than the late scripted advisory].” *See* Opposition at 9:20-

1 10:3 (citing *Weiner v. ARS Nat. Servc., Inc.*, 887 F.Supp.2d 1029, 1033 n.3 (S.D. Cal.,
 2 2012)).²² Putting aside whether Defendant actually makes a compelling argument
 3 that such circumstances arise in *subsequent* calls (it doesn't, as addressed separately),
 4 if the Honorable Court agrees with Defendant that telling a consumer that the call may
 5 be monitored or recorded puts consumers on reasonable notice that future calls may
 6 likewise be recorded, all Defendant succeeds in doing is narrowing the damages to
 7 one violation per class member (i.e. their first call). The appropriate thing to do under
 8 such circumstances would be to tailor the class definition, not deny certification
 9 outright, as described above, and as was done in *Raffin*. Just as in *Raffin*, Plaintiffs
 10 have tailored the IPA 632.7 First Call Subclass in a manner to avoid any
 11 individualized issues whatsoever, if the Honorable Court perceives this to be an issue.
 12 In fact, the class definition is taken verbatim from *Raffin*, for this very purpose.

13 Defendant has presented no evidence to support the notion that individual
 14 issues defeat certification. Conversely, Plaintiffs have presented the Court with a
 15 written policy and practice, which is supported by the testimony of Defendant's
 16 30(b)(6) witness, and corroborated by standard scripts used throughout the class
 17 period, and copies of recordings of the practice in action, all of which suggest
 18 Defendant was violating the privacy rights of thousands of people in the same way.
 19 This case is highly reminiscent of *Stern v DoCircle, Inc.*, 2014 WL 486262 (C.D. Cal.
 20 Jan. 29, 2014). There, Defendant argued that individualized issues of consent in a
 21

22 ²² Consent and/or knowledge (either actual or implied) must exist before a recording
 23 takes place, or else the IPA has been violated. Acts that take place subsequent to an
 24 IPA violation cannot cure or ameliorate a violation. *Friddle v. Epstein*, 16 Cal. App.
 25 4th 1649, 1661 (1993) (“[p]laintiff invaded defendants' privacy and violated the
 26 privacy act at the moment he began making his secret recording. No subsequent action
 27 or inaction is of consequence to this conclusion.”) Thus, determining how a borrower
 28 reacted to being told they were being recorded is irrelevant. The question is not
 whether they were offended and made a big commotion after they learned that their
 rights were violated. The question is whether there was a violation.

1 TCPA class action would defeat certification, but presented no actual evidence
 2 supporting this notion. *Id.* at *3. Judge Guilford was unpersuaded, noting the absence
 3 of evidence, and certified the class. *Id.*²³ The lesson from these decisions is that
 4 mere conjecture cannot serve as the basis for denying class certification. The
 5 evidence on the record in this case demonstrates that the issues are common.

6 Defendant has only two fallback positions. The first is that implied consent can
 7 be inferred under the “service monitoring: or “service observing” exemption, by the
 8 very act of receiving such a call, an argument it makes by citing to the *Torres v*
 9 *Nutrisystem* matter. However, This Honorable Court expressly rejected that argument
 10 in *Ades*, relying instead on the *Kearney* case as applicable, which criticized that line
 11 of reasoning. *Steven Ades & Hart Woolery v. Omni Hotels Management Corp.*, 2014
 12 WL 4627271 at *11-12 (C.D. Cal. Sept. 8, 2014).²⁴

13 Defendant’s second fallback position, which it strangely makes a highlight of
 14 its Opposition despite never addressing these documents previously in depositions or
 15 discovery, is the language that it places on the back of its billing statements in the fine
 16 print. This is what Defendant raises as its supposed saving grace:



Customer Service: 1-888-480-2432, Monday through Thursday 8 am – 8 pm, CT, Friday 8 am – 6 pm CT, and Saturday 8 am – 2 pm CT
 [Calls may be monitored and/or records for quality assurance purposes]

19
 20 ²³ Defendant argued the same thing in *Saulsberry*, but Judge Bernal properly held,
 21 when faced with a common policy and no evidence of individual issues, the policy
 22 trumped, necessitating and finding of commonality and predominance. *See*
 23 *Saulsberry v Meridian Financial Services, Inc.*, Case No. 2:14-cv-06256-JGB-JPR
 (C.D. Cal. April 14, 2016) (Dkt. No. 48) at *13 and 20. This Court has ruled in exactly
 the same manner. *Ades v. Omni Hotels Management Corp.*, 2014 WL 4627271, at
 *12-13 (C.D. Cal., Sept 8, 2014).

24 ²⁴ See also *Dake v Receivables Performance Management, LLC*, Case No. 5:12-cv-
 25 01680-VAP-SP, 2013 WL 11332863 (C.D. Cal. April 16, 2013); *Horowitz v. GC*
 26 *Services Ltd. Partnership*, 2015 WL 1959377 (S.D. Cal. April 28, 2015), *Contracting*
 27 *and Engineering, Inc. v. Hanson Aggregates Pacific Southwest, Inc.*, 2015 WL
 1346110, (S.D. Cal. March 24, 2015); *Kight v. Cashcall*, 200 Cal. App. 4th 1377,
 1399 (2011) (reasoning that hearing an automated disclosure once “would not
 28 necessarily inform a borrower that this call and all future calls” may be monitored.)

(Dkt. No. 54-10 ¶¶ 9-10 and 54-11 Exs. A-C.). First and foremost, this is not language that was expressly agreed to in a contract or a set of terms and conditions, like that in *Maghen*. Even if the Court were persuaded by *Maghen*, the cases are not analogous, because this is simply fine print written on the back of a monthly bill. There is no privity at issue like in *Maghen*. Second, this fine print language clearly indicates that *customer service calls* made by customers to *Nationstar* may be recorded. This does not put a consumer on notice that they will be recorded *when Nationstar calls them to collect on their debt*. Again, language is important. It would be quite a stretch to interpret this language the way Defendant is asking the Honorable Court to do. Finally, and most important for purposes of the Rule 23 analysis, is the fact that Defendant's position is that it sends this "disclosure" to customers in their billing statements. Logically, Nationstar's customers would have had to receive a monthly statement before they received a call from Defendant collecting on said monthly statement. *Ergo*, the question of whether this "disclosure" provides reasonable advanced notice to consumers that they will be recorded when they are called by Nationstar to collect a debt is a common question, which does not present any individualized inquiries. The Court can and should defer considering this disclosure until summary judgment, because this too is a merits issue.

Raffin thoroughly explains why the IPA 632.7 First Call Subclass should be certified. The evidence at bar is identical to that at issue in *Raffin*. The arguments raised by Defendant are identical to those raised by the defendants and rejected in *Raffin* and by this Court in *Ades*. There are no individualized issues of consent for the Subclass, and thus, it should be certified.

ii. Defendant's Recording Advisory Does Not Give Rise To An Inference Of Actual Or Implied Consent On Subsequent Calls, and Thus, The IPA 632.7 Class Should Be Certified

If Defendant's outbound call scripts used the language "all calls are monitored or recorded" instead of "this call may be monitored or recorded" then Plaintiffs would

1 concede that individualized issues would predominate with respect to subsequent
 2 calls, and would seek only to certify the proposed IPA 632.7 First Call Subclass, as
 3 was done in the *Raffin* matter. However, Defendant’s outbound call advisory does
 4 not put consumers on reasonable notice that “all future calls” may be monitored, only
 5 that the call they are currently on is being recorded. *Kight v. Cashcall*, 200 Cal. App.
 6 4th 1377, 1399 (2011). As described above, the *Raffin* court went so far as to
 7 emphasize the term “all calls” in its Order, so as to specify the importance of the use
 8 of this language, over alternative language used in some of Medicredit’s scripts which
 9 used the phrase “this call” in the recording advisory. *Raffin v. Medicredit, Inc.*, 2017
 10 WL 131745 at *7 (C.D. Cal. Jan. 3, 2017).

11 This distinction is also highlighted by the very cases cited by Defendant. For
 12 instance, *Griggs-Ryan v. Smith*, 904 F.2d 112, (1st Cir. 1990) involves a different law
 13 than the IPA, and is not substantively applicable to the case at bar, but its reasoning
 14 is premised on evidence on the record that showed that defendant informed plaintiff
 15 that it records “all incoming calls.” *Id.* at 118.²⁵ The reasoning behind the case was
 16 that the more frequently someone heard the language that “all” calls were recorded,
 17 the more likely they would be put on notice that future calls would be recorded. This
 18 is an unremarkable conclusion. Of course that would be the case. Again, language is
 19 important. The more nuanced question at issue here is whether telling someone “this
 20 call may be monitored or recorded” puts them on notice that a separate call will
 21 likewise be recorded. Plaintiffs posit that this is a common question of law that can
 22 be answered in one stroke, and therefore goes to merits and damages issues.

23 Again, it bears emphasis that if the Honorable Court agrees with Defendant’s
 24 position on this issue, the appropriate thing to do is to deny certification only as to the
 25 IPA 632.7 Class, and grant certification to the IPA 632.7 First Call Subclass.

27 ²⁵ *In re Google Inc. Gmail Litig.*, 2014 WL 1102660 (N.D. Cal. Mar. 18, 2014), relied
 28 on by Defendant, is of limited relevance, as it does not involve IPA claims.

1 **iii. Determining whether a borrower was in California is not an**
 2 **individualized issue**

3 Defendant next argues that it is an individualized issue as to whether any class
 4 member was located in California when they were recorded. However, This
 5 Honorable Court has previously rejected this exact line of argument. *Steven Ades &*
 6 *Hart Woolery v. Omni Hotels Management Corp.*, 2014 WL 4627271 at *14-15 (C.D.
 7 Cal. Sept. 8, 2014) (“To the extent that Omni has evidence that some of these calls
 8 were not recorded or were not placed from California or by the putative plaintiff,
 9 Omni can offer that evidence to disqualify class members.”) The same argument was
 10 raised with and rejected by the *Raffin* court. *Raffin v. Medicredit, Inc.*, 2017 WL
 11 131745 at *3 (C.D. Cal. Jan. 3, 2017).

12 **iv. Determining class-wide damages is not an individualized**
 13 **issue**

14 As This Court held in *Ades*, “issues of excessive damages are better addressed
 15 at a later stage of the litigation.” *Steven Ades & Hart Woolery v. Omni Hotels*
 16 *Management Corp.*, 2014 WL 4627271 at *14-15 (C.D. Cal. Sept. 8, 2014) (citing
 17 *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 954 (7th Cir.2006) and *Ades v. Omni*
 18 *Hotels Management Corp.*, 46 F.Supp.3d 999 (C.D. Cal. Sept. 8, 2014)). The same
 19 result was reached in *Raffin*. *Raffin v. Medicredit, Inc.*, 2017 WL 131745 at *9 (C.D.
 20 Cal. Jan. 3, 2017) (“Medicredit's concerns regarding disproportionate and excessive
 21 damages are better addressed at a later stage of the litigation”). Defendant presented
 22 no evidence of an individualized damages issue, because there isn't one.

23 **c. Mr. Borlin's Report Is Not Necessary For Purposes Of**
 24 **Certification, And Plaintiffs Does Not Need To Present A**
 25 **Feasible Methodology For Identifying Class Members Under**
 26 **Under Recent Binding Ninth Circuit Law**

27 As demonstrated by *Raffin*, Plaintiffs' certification theory does not depend on
 28 the testimony of experts. In fact, under a nearly identical case, and when presented
 with a battle of experts and objections from both sides, Judge King held that the court
 did not need to rely on the expert declarations to rule on whether the requirements of

1 Rule 23 had been satisfied. *Raffin v. Medicredit, Inc.*, 2017 WL 131745 at *3 n. 3
 2 (C.D. Cal. Jan. 3, 2017).²⁶ The same is true here, for the same reasons.²⁷

3 Bolstering this holding, within days of the *Raffin* decision, the Ninth Circuit
 4 issued a landmark decision regarding Ascertainability standards in consumer class
 5 actions, which will no doubt be cited by courts for decades. In the decision of *Briseno*
 6 *v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017), the Ninth Circuit held that in
 7 the context of a consumer class action, that plaintiffs not only do not have to identify
 8 class members as a prerequisite to meeting their burden under Rule 23, but also do
 9 not even have to present a feasible methodology for doing so, as manageability issues
 10 are best reserved post-certification.²⁸ The Ninth Circuit dissected Rule 23 and its
 11 requirements, and disagreed with defendant’s interpretation, holding as follows:

12 “[T]he language of Rule 23 does not impose a freestanding
 13 administrative feasibility prerequisite to class certification. Mindful of
 14 the Supreme Court’s guidance, we decline to interpose an additional
 15 hurdle into the class certification process delineated in the enacted Rule”

16 “[The appropriate] question is not whether the identity of class members
 17 can be ascertained with perfect accuracy at the certification stage but
 18 whether the defendant will receive a fair opportunity to present its
 19 defenses when putative class members actually come forward”

20 “In summary, the language of Rule 23 neither provides nor implies that
 21 demonstrating an administratively feasible way to identify class
 22 members is a prerequisite to class certification”

23 *Id.* at *4, 9 and 10. Nationstar argues that Plaintiffs must provide evidence that the

24 ²⁶ Likewise, the rulings in *Ades* and *Saulsberry* did not rely on expert testimony.

25 ²⁷ Plaintiffs will separately address the substance of Defendant’s objections to Mr.
 26 Borlin’s methodology in their Opposition to Defendant’s Motion to Exclude.

27 ²⁸ The case involved mislabeling claims, brought under various state unfair
 28 competition laws and false advertising statutes, pertaining to a 100% natural label on
 the face of the packaging of products purchased by class members. The District Court
 certified the class, on behalf of consumers in eleven states who purchased applicable
 products. *Id.* at 1123. Defendant appealed, arguing that plaintiffs presented “no
 administratively feasible way to identify members of the proposed classes because
 consumers would not be able to reliably identify themselves as class members.” *Id.*

1 methodologies for identifying class members from non-class members is feasible.
 2 Not so. Nationstar attempts to disguise its argument as one of predominance, but in
 3 reality, this is an ascertainability argument it is raising, and one which has very
 4 recently been definitively decided in Plaintiffs' favor. Thus, Nationstar's arguments
 5 are contrary to Ninth Circuit authority, and can be disregarded.

6 **2. The Class Is Sufficiently Numerous**

7 Defendant argues that Plaintiffs have not presented a sufficiently numerous
 8 class. However, in the same breath, Defendant's expert appears to be admitting that
 9 her own review of the class data shows a class size of 67,306 class members. Kemp
 10 Decl., Ex. C, ¶¶ 52-53. Clearly numerosity is satisfied.

11 **3. Plaintiffs Are Adequate And Typical Class Representatives**

12 Unfortunately, Defendant resorts to attacking Plaintiffs' adequacy, rather than
 13 substantively addressing its own objective and common violations of the IPA. This
 14 issue can be quickly dispatched. "[A] court must be wary of a defendant's efforts to
 15 defeat representation of a class on grounds of inadequacy when the effect may be to
 16 eliminate any class representation." *Kline v. Wolf*, 702 F.2d 400 (2d Cir.1983). The
 17 test for adequacy focuses on conflicts of interest and zeal and competence. While the
 18 integrity of a plaintiff can be one factor considered, competency of counsel²⁹ and
 19 absence of antagonistic interests are usually considered determinative. *Lerwill v.*
 20 *Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir.1978). "Resolution of two
 21 questions determines legal adequacy: (1) do the named plaintiffs and their counsel have
 22 any conflicts of interest with other class members and (2) will the named plaintiffs and
 23 their counsel prosecute the action vigorously on behalf of the class?" *Hanlon v.*
 24 *Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir.1998). Courts are rightfully skeptical of
 25 unsubstantiated character attacks on a class representative. *Polanco v. Schneider Nat.*
 26 *Carriers, Inc.*, 2012 WL 10717265, at *5 (C.D. Cal. Apr. 25, 2012) ("We do not look
 27

28 ²⁹ Defendant concedes that Plaintiffs' counsel is adequate to represent the class.

1 with sympathy upon these types of unsubstantiated character attacks by Defendant in
 2 opposing class certification, given that they are made for the purpose of defeating class
 3 certification, not out of any genuine concern for the interests of the class.”)

4 Just as in this line of cases, Plaintiffs understand their obligations as class
 5 representatives are to protect the class, and make decisions that were within their
 6 fiduciary duties to the others whose privacy was similarly invaded. Dkt. Nos. 35-5 and
 7 35-6. Plaintiffs have no conflict with the class members. Plaintiffs have diligently
 8 pursued this matter as a class action.³⁰ Plaintiffs are represented by counsel who has
 9 been certified as class counsel on numerous other matters, and Defendant does not
 10 challenge class counsel’s adequacy. The Court should be highly skeptical and “wary”
 11 of Defendant’s attacks against Plaintiffs, which are largely unwarranted.

12 Defendant has likewise not convincingly challenged Plaintiffs’ typicality.
 13 Defendant’s strategy in this regard is highly bizarre. It attacks Plaintiffs’ Article III
 14 standing and argues that since Plaintiffs’ suffered a minimal injury if any, they are not
 15 typical. But Defendant’s hoopla regarding *Spokeo* is much ado about nothing. For
 16 the very same reasons as thoroughly discussed in both *Raffin* decisions, IPA violations
 17 are an “affront to human dignity” which violate basic rights to privacy, causing a
 18 concrete and particularized injury. *Raffin v. Medicredit, Inc.* 2016 WL 7743504 at *3
 19 (C.D. Cal. Dec. 19, 2016). A wealth of post-*Spokeo* cases hold that privacy violations
 20 convey standing.³¹ The majority of cases in the wake of *Spokeo* have held that it does
 21

22
 23 ³⁰ The circumstances of how this case arose are irrelevant. Defendant’s speculation
 24 into confidential discussions between Plaintiffs and their counsel are incorrect. What
 25 is important is that Plaintiffs feel strongly that their privacy rights were violated, and
 that the rights of the rest of the class members should be protected and pursued.

26 ³¹ *Bona Fide Conglomerate, Inc. v. SourceAmerica*, 2016 WL 3543699 (S.D. Cal.
 27 June 29, 2016); *Thomas v. FTS USA, LLC*, 2016 WL 3653878 (E.D. Va. June 30,
 28 2016); *In re Nickelodeon Consumer Privacy Litig.*, 2016 WL 3513782 (3d Cir. June
 27, 2016).

1 not impact certification.³² Moreover, the Ninth Circuit has held that “[i]n a class
2 action, standing is satisfied if at least one named plaintiff meets the requirements.”
3 *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007).

4 Beyond the fact that *Spokeo* does not relieve Defendant of liability, Nationstar
5 has not filed a motion to dismiss on the basis that Plaintiffs lack standing. Rather,
6 Nationstar asks for this substantive relief in its Opposition to Plaintiffs’ Motion for
7 Class Certification. This is a procedurally improper request. The Honorable Court
8 has no motion before it relating to Plaintiffs’ standing to bring IPA claims. Ruling
9 that Plaintiffs’ lack standing in a class certification order would be improper.

10 Defendant acknowledges that all of its scripts and policy documents
11 specifically contain no recording advisory at the outset. Plaintiffs have narrowly
12 tailored the class definition in such a way as to focus on the singular legal issue of
13 whether a recording advisory must be given at the outset of a call under 632.7. This
14 was Defendant’s common policy and practice, not some aberration. Moreover, every
15 one of the recordings provided to the Court in support of Plaintiff’s Motion suffers
16 from this defect. Plaintiffs’ claims are typical of everyone who was recorded under
17 these same common policies. Because there was no advisory given at the outset of
18 Plaintiffs’ calls, Plaintiffs suffered the same injury as members of the class for which
19 they have sought certification. Plaintiffs and class members were all recorded on their
20 cell phones without consent. Plaintiffs and class members all suffered the same
21 invasions of privacy as a result of these surreptitious recordings. § 632.7 of the IPA
22 is a strict liability statute. Plaintiffs have presented a streamlined certification theory
23 which affects all members identically, and which is based off of Defendant’s standard
24 and common policies, practices and scripts. Plaintiffs are both typical and adequate.

25
26 ³² *McLaughlin v. Wells Fargo Bank, NA*, No. C 15-02904 WHA, 2016 WL 3418337
27 (N.D. Cal. June 22, 2016); *Hawkins v. S2Verify*, No. C 15-03502 WHA, 2016 WL
28 3999458 (N.D. Cal. July 26, 2016); *Lafollette v. Liberty Mut. Fire Ins. Co.*, No. 2:14-
CV-04147-NKL, 2016 WL 4083478, (W.D. Mo. Aug. 1, 2016).

4. Class Action Treatment Is Superior

As This Court held in *Ades*, “the Court is not persuaded that \$5,000 in damages is so clearly sufficient to motivate individual litigation involving complex factual and legal issues as to weigh against class certification. Therefore, the Court finds that plaintiffs have satisfied their burden of showing superiority.” *Steven Ades & Hart Woolery v. Omni Hotels Management Corp.*, 2014 WL 4627271 at *14-15 (C.D. Cal. Sept. 8, 2014). The same result was reached in *Raffin*. The Superiority analysis can end there.

III. CONCLUSION

Defendant must be held accountable for mass-invasions of privacy that affected every single person that it called and recorded in reference to their mortgages. There is nothing “palpably unfair” about enforcing binding California law against a serial offender of privacy rights, which engaged in over a hundred thousand acts that each individually would constitute an “affront to human dignity.” Defendant should take up its grievances with the California Legislature. Fairness does not dictate that Defendant be given a get out of jail free card based on its pure speculation. This Honorable Court should send a strong message to Defendant that class certification is not the time or place to make emotional cries for mercy. The law is the law. And each and every one of the Predominance arguments raised by Nationstar has been addressed either by this Honorable Court in *Ades*, or by Judge King in *Raffin*, to complete satisfaction. There is no reason to depart from these well-reasoned rulings. For the foregoing reasons, Plaintiffs submit that their Motion for Class Certification under Rule 23(b)(3) against Defendant should be granted.

Dated: March 24, 2017

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By: /s/ Adrian R. Bacon

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CERTIFICATE OF SERVICE

Filed electronically on this 24th day of March, 2017, with:

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Honorable Judge Christina A. Snyder
United States District Court
Central District of California

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